SUPREME COURT, U. S.

FILED
SEP 11 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 494

GEORGE KASTENBAUM,
Petitioner,

vs.

THE FLORIDA BAR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

ERNEST J. HEWETT
1400 First National Bank Building
Miami, Florida
Attorney for Respondent

September 12, 1970

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

STATEMENT OF THE CASE 1
ARGUMENT 2
CONCLUSION 6
APPENDIX 1 ..... A1
APPENDIX 2 ..... A3
APPENDIX 3 ..... A5

Table of Authorities

CASES

Berman v. *United States*, 1937, 302 U.S. 211 3
In The Matter of The Florida Bar, Fla. 1969, 225 So. 2d 881 1
Petition of Florida Bar Association, 1949, 40 So. 2d 902 1
The Florida Bar v. *Levenson*, Fla. 1968, 211 So. 2d 173, 174 6

STATUTE

18 U.S.C. §1951 2

COURT RULES

Rule 11.07, Integration Rule of The Florida Bar 2, 3, 4, 5, 6
Rule 11.10, Integration Rule of The Florida Bar 3, 4
Rule 11.11, Integration Rule of The Florida Bar 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 494

GEORGE KASTENBAUM,
Petitioner,

vs.

THE FLORIDA BAR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE FLORIDA BAR IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

On February 12, 1970, attorney GEORGE KASTENBAUM, a member of The Florida Bar,[1] was convicted in

1. In *Petition of Florida State Bar Association*, 1949, 40 So. 2d 902, the Supreme Court of Florida granted a petition to integrate The Florida Bar. It thereafter promulgated an Integration Rule, which it has amended from time to time. The parts of the Integration Rule dealing with rules of discipline are set out in *In the Matter of The Florida Bar*, Fla. 1969, 225 So. 2d 881.

the United States District Court for the Southern District of Florida on both counts of an indictment accusing him of violating 18 U.S.C. §1951 by conspiring to obstruct interstate commerce by extortion and by attempting to commit extortion. He was adjudicated guilty and on June 7, 1970, following denial of his post-trial motions, sentenced to a jail term. Kastenbaum's appeal from that judgment is pending.

Pursuant to Rule 11.07(3) of the Integration Rule of The Florida Bar (App. 1), The Florida Bar filed a Petition for Suspension on the basis of Kastenbaum's conviction.

Kastenbaum filed a Response to Petition of The Florida Bar, in which he admitted his conviction, denied his guilt, argued in part the legality of his conviction, and asked that consideration of The Florida Bar's petition be postponed "until after the case is finally adjudicated".

In addition Kastenbaum filed a Motion for Hearing so that he could present evidence:

(a) to explain the circumstances of his conviction;

(b) to show his good character; and

(c) in mitigation of the offense.

The Supreme Court of Florida denied the request for evidentiary hearing and ordered Kastenbaum suspended, effective June 8, 1970. On July 27, 1970, the Supreme Court of Florida stayed its earlier order pending disposition by this Court of this petition.

ARGUMENT

Petitioner argues that his conviction is not final because an appeal is pending, that suspending him from the practice of law while his appeal is pending burdens the right of appeal in federal cases, and that suspending him

without first affording him an evidentiary hearing denies him due process.

We submit that these contentions are without merit.

1. Finality of Conviction.

The criminal charges against petitioner were finally determined after he was found guilty, adjudicated guilty and sentenced. Although execution of the sentence has been stayed pending his appeal, petitioner is a convicted felon. *Berman* v. *United States*, 1937, 302 U.S. 211.

The presumption of innocence no longer applies. On any appeal, it is petitioner's burden to show reversible error. The fact that petitioner has the right of appellate review of the judgment against him does not affect or alter the nature of that judgment or mean that it is not a final judgment.

2. No Burden on Federal Rights.

Petitioner argues that, if he loses his appeal and has to serve his prison sentence, and if The Florida Bar takes permanent disciplinary action against him, he will not be able to move for reinstatement to practice until later in time and will have served a longer suspension than if he had not appealed at all.

That argument assumes both his guilt and permanent disciplinary action by the Supreme Court of Florida which either requires or allows him to apply for reinstatement.

That argument overlooks the latitude and flexibility of the disciplinary measures provided by Rule 11.10 of the Integration Rule which deals with permanent disciplinary measures as distinguished from temporary suspensions under Rule 11.07. These range from a public reprimand to probation (six months to three years) to suspension (for

a definite or indefinite period) to disbarment (for a definite or indefinite period of time, or permanently) (App. 2).

If an attorney is disbarred permanently, he may not apply for reinstatement (App. 3). If an attorney is disbarred for a definite period of time, he may apply for reinstatement once that period has run. If an attorney is disbarred for an indefinite period of time, he may apply for reinstatement after six months. If an attorney is suspended, he may or may not ever have to petition to become eligible for all the privileges of membership in The Florida Bar.

There is no reason to assume that any permanent disciplinary action that may be taken will be more severe if a convicted attorney appeals and loses than if he begins to serve his sentence as soon as it is imposed. There is every reason to assume that the disciplinary agencies of The Florida Bar will consider the length of the period of suspension under Rule 11.07 in determining the nature and extent of permanent disciplinary action under Rule 11.10.

3. Demand for Hearing.

Petitioner claims that he was denied due process when the Supreme Court of Florida suspended him after his conviction without first affording him an evidentiary hearing.

An evidentiary hearing at that stage could have accomplished nothing. The only issue was whether petitioner had been convicted of a felony; in his Response to Petition of The Florida Bar, he admitted that he had been.

It would have been improper for the Supreme Court of Florida to take testimony and in effect pass in advance upon the merits of an appeal pending in the Federal courts. Yet that is what petitioner was asking for.

Rule 11.07(4) of the Integration Rule provides for a hearing to determine what disciplinary action should be taken, once an attorney's conviction has been affirmed on appeal. It simply defers the time of that hearing until after any appeal has been completed.

The American Bar Association Special Committee on Evaluation of Disciplinary Enforcement in its report on Problems and Recommendations in Disciplinary Enforcement said:

> Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt (pp. 127-128).

The Committee, whose report was approved by the House of Delegates on August 12, 1970, recommended the exact procedure used here, including:

> 1. An attorney will be suspended automatically upon his conviction of a serious crime, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

* * *

> 5. Upon the receipt of a certificate of conviction of an attorney of a serious crime, the court having disciplinary jurisdiction will not only suspend him from practice but also will immediately institute a disciplinary proceeding in which the sole issue to be determined will be the extent of the final discipline to be imposed, and the court will refer the matter to the appropriate disciplinary agency for that purpose, provided, that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded (pp. 128-129).

The same Committee report stated:

> No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline (p. 124).

See also *The Florida Bar* v. *Levenson*, 1968, 211 So. 2d 173, 174 (discussing Rule 11.07 which was at that time designated Rule 11.08).

We submit that the Integration Rule of The Florida Bar answers the problem the Committee discussed and safeguards the constitutional rights of an attorney convicted of a felony.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ERNEST J. HEWETT
1400 First National Bank Building
Miami, Florida 33131
Attorney for Respondent

APPENDIX

APPENDIX 1

Integration Rule of The Florida Bar

RULE 11.07: DISCIPLINE UPON CONVICTION

(1) *Determination or judgment of guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this State; or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the Clerk of this Court and to the Executive Director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(a) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director. An opportunity to respond to the petition and appear at any

hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the tenth day following the entry of judgment of guilt, the suspension shall remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of the trial court in the criminal proceeding, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) *Suspension by judgment (other than by state court).* If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme

Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The Florida Bar may thereafter petition the Supreme Court for issuance of a notice to the convicted attorney to show cause why appropriate disciplinary judgment should not be entered. The respondent attorney may, within fifteen (15) days, file his return with the Clerk of the Supreme Court. The Court shall direct such further proceedings as may be appropriate.

APPENDIX 2

Integration Rule of The Florida Bar

RULE 11.10: DISCIPLINE BY SUPREME COURT

The judgments entered finding members of The Florida Bar guilty of misconduct shall include one or more of the following disciplinary measures:

(1) *Probation.* The respondent may be placed upon probation for a stated period of time of not less than six (6) months nor more than three (3) years. The judgment shall state the conditions of the probation which may include the following: Supervision of all or part of the respondent's work by a member of The Florida Bar; the making of reports to a designated agency; the satisfactory completion of a course of study or a paper on legal ethics approved by the Supreme Court. Failure to observe the conditions of the probation, or a finding of probable cause as to conduct of the respondent committed during the pe-

riod of probation, shall terminate the probation. In such event, even though such finding of probable cause shall be made after the expiration of the period of probation, the judgment shall be reconsidered and an appropriate judgment shall be entered.

(2) *Public Reprimand.* A public reprimand shall be administered in the manner prescribed in the judgment. Due notice shall be given to the respondent of any hearing set down to administer the reprimand. The respondent shall appear personally if required, and a memorandum of the hearing shall be made a part of the record of the proceeding.

(3) *Suspension.* The respondent may be suspended from the practice of law for an appropriate time or for a definite period of time and an indefinite period thereafter to be determined by the conditions imposed by the judgment. During such suspension the respondent shall continue to be a member of The Florida Bar but without the privilege of practicing; and upon the expiration of the suspension period and the satisfaction of all conditions accompanying the suspension, the respondent shall become eligible to all of the privileges of membership in The Florida Bar.

(4) *Disbarment.* A judgment of disbarment without further qualification shall be construed to be disbarment for an indefinite period of time; but the judgment may be stated to be disbarment for an indefinite period of time, or for a definite period of time and an indefinite period thereafter to be determined by the conditions imposed in the judgment. No period of disbarment shall be for less than six (6) months. During disbarment the respondent shall not be a member of The Florida Bar. During any indefinite period of disbarment he may apply for reinstatement in the manner provided by the rule on reinstatement.

APPENDIX 3

Integration Rule of The Florida Bar

RULE 11.11: REINSTATEMENT

An attorney who has been disbarred other than by permanent disbarment, or whose resignation pending disciplinary proceedings has been accepted under conditions which allow reinstatement, may be reinstated to membership in The Florida Bar pursuant to this rule. The proceedings under this rule are not applicable to suspension for non-payment of dues.

(1) *Petitions: form, contents, fingerprints.*

(a) *Filing.* The original petition for reinstatement and three (3) copies thereof shall be in writing, verified by the petitioner, addressed to the Board of Governors and filed with the Executive Director at the office of The Florida Bar in Tallahassee. With the filing of his petition the petitioner shall furnish two sets of his fingerprints on record cards furnished by The Florida Bar for this purpose. One (1) copy of the petition shall be promptly filed by the Executive Director with the Clerk of this Court.

(b) *Form and exhibits.* The petition shall be in such form and shall be accompanied by such exhibits as the Board of Governors shall prescribe. The information required concerning the petitioner may include any or all of the following matters in addition to such other matters as may be reasonably required to determine the fitness of the petitioner to resume the practice of law: criminal and civil judgments; disciplinary judgments; copies of income tax returns together with consents to secure original returns; occupation during disbarment and information in connection therewith; financial statements; statement of restitu-

tion of funds which were the subject matter of disciplinary proceedings.

(2) *Deposit for cost.* The petition shall be accompanied by a deposit in such amount as the Board of Governors shall prescribe to insure payment of reasonable costs of the proceeding. Such costs in the discretion of the Board of Governors may include court reporters' fees, witness fees and traveling expense, and reasonable traveling expense and out-of-pocket costs of the referee or investigative committee and attorneys for The Florida Bar.

(3) *Reference of petition for hearing.* The Board of Governors shall refer the petition for reinstatement for investigation. Such investigation may be by means of formal hearing and findings or otherwise. Such reference shall be in the discretion of the Board of Governors to a referee, a grievance committee of the county where the petitioner resides, or formerly resided, or to a reinstatement committee to be appointed by the Board of Governors. Provided, however, that no such reference shall be made until evidence is submitted showing that all costs assessed against the petitioner in all disciplinary proceedings have been paid. Provided, further, that the petition shall be referred to a referee designated by the Supreme Court if requested by petitioner.

(4) *Attorney for the Bar.* When a petition for reinstatement is filed, the Board of Governors may appoint, or may request any local bar association to appoint, from the active members of The Florida Bar, one or more attorneys to represent The Florida Bar in the proceeding. The duties of such attorneys shall be to appear at the hearings and to prepare and present to said committee or referee evidence which, in the opinion of the committee or referee or such attorneys, should be considered in passing upon the petition.

(5) *Procedure.* The referee or committee to which the petition for reinstatement is referred shall conduct the investigation as a trial in the same manner, to the extent practical, as proceedings are conducted under the rule concerning trials. The matter to be investigated and decided shall be the fitness of the petitioner to resume the practice of law.

(6) *Hearing, notice, evidence*

(a) *Notice.* The committee or referee to whom the petition for reinstatement is referred shall fix a time and place for hearing, and notice thereof shall be given at least ten (10) days prior to the hearing to the petitioner, to attorneys representing The Florida Bar, and to such other persons as may be designated by any member of the committee or the referee to which the petition is referred.

(b) *Appearance.* Any of said persons to whom notice is given, any other interested person, or any local bar association, may appear before said committee in support of or in opposition to the petition at any time or times fixed for hearings thereon.

(c) *Failure of petitioner to be examined.* For the failure of the petitioner to submit to examination as a witness pursuant to notice given, the Board of Governors shall dismiss the petition for reinstatement unless good cause is shown for such failure.

(7) *Prompt hearing; report.* The committee or referee to which a petition for reinstatement has been referred by the Board of Governors shall proceed to a prompt hearing, at the conclusion of which it shall make and transmit to the Board of Governors a report which shall include the findings of fact and a recommendation as to whether or not the petitioner is qualified to resume the practice of law.

Such report shall be in the form prescribed by the Board of Governors.

(8) *Notice of reinstatement committee's or referee's report.* When the report of the committee or referee is received at the office of the Executive Director in Tallahassee, a copy thereof shall be sent by the Executive Director to the petitioner and to the members of The Florida Bar representing the Bar and to each local bar association appearing in the proceeding. A copy of the letter of transmittal, bearing the date of mailing and the name of the person mailing the same, shall be retained in the office of The Florida Bar and shall be prima-facie evidence of the mailing thereof upon said date.

(9) *Statement in opposition or support.* At any time within ten (10) days after mailing of the notice of report the petitioner or the member of The Florida Bar representing the Bar or any local bar association may file in the office of The Florida Bar in Tallahassee an original and three (3) copies of a typewritten statement in support of or in opposition to the report.

(10) *Judgment.* After filing of said report, the Board of Governors shall review the petition, the findings and recommendations of the committee or referee and the record before such committee or referee and shall determine whether it shall support or oppose reinstatement. The Board shall file its recommendation, together with the record of proceedings, in the Supreme Court and shall serve a copy upon the petitioner. The Supreme Court shall then enter an appropriate judgment. If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate him in The Florida Bar; provided, however, that the judgment may make such

reinstatement conditional upon the payment of all or parts of the costs of the proceeding and upon the making of partial or complete restitution to parties harmed by the petitioner's misconduct which led to the termination of his membership in The Florida Bar; and further provided, however, that if the petitioner has been removed from membership in The Florida Bar for more than ten (10) years, the reinstatement may be conditioned upon the furnishing of such proof of competency as may be required by the judgment in the discretion of the Supreme Court, which proof may include certification by the Florida Board of Bar Examiners of the successful completion of all examinations for admission to The Florida Bar subsequent to the entry of the judgment.

(11) *Successive petitions.* No petition for reinstatement shall be filed within one (1) year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.